DATE: June 12, 1996
CASE NO.: 95-INA-00190

In the Matter of:

MALL FOODS TRIVENT, INC.,
Employer

On Behalf of:

MARIO CLAROS,
Alien

Appearance: Franklin S. Abrams, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 29, 1993, Mall Foods Trivent, Inc. ("Employer"), filed an application for labor certification to enable Mario Claros ("Alien") to fill the position of Cook (AF 6, 15). The job duties for the position are:

> Cook variety of foods, including Mexican specialties such as various types of Mexican salads, tacos, enchilladas [sic], tortillas, and other Mexican-style foods; different chicken and turkey dishes, and American foods. Prepares, seasons and cooks these foods which include meats, vegetables, soups and other items. Procures food from storage, measures and mixes ingredients, regulates ovens, broilers, grills, roasters and steam kettles. Observes and test[s] foods during cooking.

The requirement for the position is two years of experience either in the job offered or in a related occupation as a pantry goods maker. The Employer noted Other Special Requirements as, "Must be able to mix ingredients for Mexican dishes such as tacos and enchilladas."

The CO issued a Notice of Findings on July 7, 1994 (AF 60-61), proposing to deny certification on the grounds that the Employer's job requirements are excessive and restrictive. Specifically, the CO stated that the Employer's requirements for two years of experience in the job offered (Cook) meets the SVP requirement for that occupation; however, the related experience requirement of two years as a Pantry Goods Maker exceeds the SVP for that occupation, which is a maximum of six months of experience. Accordingly, the CO directed the Employer to either reduce the requirements for the related occupation or document how the requirement arises from business necessity. The CO noted that if the Employer reduces the requirement, it must indicate amendments to be made on the application for labor certification, and must document its willingness to readvertise.

Accordingly, the Employer was notified that it had until August 11, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated July 29, 1994 (AF 62-80), the Employer contended that the Board of

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n,"* where *n* represents the page number.

Alien Labor Certification Appeals has held that "experience required in a related occupation can never be restrictive since it is expanding the job search." In support of this argument, the Employer cited *Matter of Best Luggage, Inc.,* 88-INA-553 (Nov. 1, 1989). The Employer also argued that the CO, in the NOF, confused the SVP level of the related occupation with the SVP level of the offered position; *i.e.*, the issue is not how much experience is necessary to be qualified as a Pantry Goods Maker, it is how much experience is necessary to become qualified as a Cook. The Employer concluded its rebuttal by reporting that it had recently received approval of an application for labor certification in "a case with identical requirements" as those here.

The CO issued the Final Determination on August 17, 1994 (AF 81-83), denying certification because the Employer failed to reduce the excessive and restrictive requirement of two years of experience in the related occupation as a Pantry Goods Maker and because the Employer failed to document the business necessity of the alternative experience requirement. The CO found that a worker with experience in the alternate occupation would not need to have the ability to perform the job as would someone who has experience in the offered job. Accordingly, the CO determined that the Employer remains in violation of the regulations at 20 C.F.R. § 656.21(b)(2).

On August 29, 1994, the Employer requested review of the Denial of Labor Certification (AF 84-96), continuing to cite *Matter of Best Luggage, Inc., supra*. See also, *Systems International, Inc.,* 92-INA-60 (Aug. 24, 1993); *ERF, Inc., d/b/a Bayside Motor Inn,* 89-INA-105 (Feb. 14, 1990). On November 14, 1994, the Employer requested reconsideration of the denial by the CO based on a recent BALCA decision (AF 98). *Matter of Henry L. Malloy*, 93-INA-355 (Oct. 5, 1994). On November 30, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer filed a Brief on January 20, 1995.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruiting process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* ("DOT"), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

In this case, the CO denied certification because the Employer's alternative requirement of two years of experience as a Pantry Goods Maker was outside the levels of experience for that

position in the *Dictionary of Occupational Titles*, and the Employer had failed to document the business necessity of the requirement. The Employer argues that as a matter of law, certification cannot be denied based on the experience requirements for an alternative requirement, citing *Best Luggage, Inc.*, 88-INA-553 (Nov. 1, 1989), and *Henry L. Malloy*, 93-INA-3555 (Oct. 5, 1994).

In *Best Luggage, supra*, the Board reversed the CO's denial of labor certification where that denial was based on a finding that the alternative experience requirement of two years of experience as a partner in a wholesale luggage business was unduly restrictive. The Board stated:

> The job opportunity in question is that of a Wholesaler. Accordingly, it is not unduly restrictive to require experience as a wholesaler. The Panel also concurs that the employer's experience requirements were listed in an alternative manner. Applicants could have either two years experience as a wholesaler or two years experience as a partner in a wholesale luggage/handbag business. Applicants were not required to have experience as a partner, this alternative experience requirement cannot be considered unduly restrictive. This alternative requirement is both related to and appropriate for the job opportunity . . .

In *Malloy, supra*, the Employer's requirements were two years of experience as a Cook, or in the alternative, two years experience as a Housekeeper. The CO denied labor certification finding the alternative experience requirement unduly restrictive because the *Dictionary of Occupational Titles* only requires three months experience for the position of Housekeeper. The Board reversed the CO's denial of labor certification, finding:

> [s]ince the Employer's experience requirement of 'Housekeeper with daily cooking duties' is only an alternative requirement, it is not unduly restrictive under *Best Luggage, Inc.* to require more experience than the SVP in the DOT for 'Housekeeper.'

In *Systems International, supra,* the Board found that the employer's alternative job qualifications ultimately do not present unduly restrictive requirements within the meaning of § 656.21(b)(2) since the primary requirements are entirely straightforward, not unduly restrictive,
and a careful reading of the alternative requirements show them to be expansive rather than restrictive.

In this case, the primary requirement of two years of experience as a Cook is within the SVP of the DOT standards for that position. The CO is correct that the alternative requirement of two years of experience as a Pantry Goods Maker is beyond the SVP of that position in the

DOT. However, an alternative experience requirement cannot be unduly restrictive where it is appropriate to, and related to the job. See *Best Luggage, supra*; *Malloy, supra*. "Pantry Goods Maker" does include numerous food preparation duties. See *Dictionary of Occupational Titles* at 317.684-014. Moreover, the primary requirements for the position of Cook are entirely straightforward, and the alternative requirements are expansive rather than restrictive. See *Systems International, supra*.

Upon careful review of the record, we find that the alternative experience requirement of Pantry Goods Maker is related to and appropriate to the position of Cook. As it is an alternative requirement, it is related to the position of Cook, and is expansive rather than restrictive, it cannot be considered an unduly restrictive requirement under *Best Luggage, supra*. In addition, there are

no other grounds cited by the CO on which labor certification was denied. Based on the foregoing, we find that the CO's denial of labor certification must be reversed.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED**.

Entered this the August 21, 2002 for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the

basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.